Petition

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81 5731

WILLIAM GIBBS HYMAN,

Petitioner,

-versus-

THE STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of South Carolina entered in the above styled case.

OPINIONS BELOW

The opinion of the Supreme Court of South Carolina in this case is not yet reported and is appended hereto at 1a. The denial of the Petition for Rehearing is unreported and is appended hereto at 6a.

JURISDICTION

The opinion of the Supreme Court of South Carolina was entered on July 22, 1981. A timely Petition for Rehearing was denied on August 19, 1981. By order of Chief Justice Burger, the time for petitioning for a Writ of Certiorari to review the judgment below was extended to and including November 17, 1981. This Court has jurisdiction to review the judgment below under 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED

1. Whether the trial court's charge to the jury at the penalty phase of the bifurcated trial violated the United States Constitution by (1) permitting the sentencing authority to impose the death sentence without a finding that the Petitioner either had a specific intent to kill the victim, or at least personally fired the fatal shot, and (2) by failing to instruct the jury that they should abide by the prosecutor's determination that the death penalty was not appropriate for the Petitioner unless he was found to have fired the fatal shot.

2. Whether the constitutional limits imposed upon the prosecutor's discretion to enhance punishment for plea bargaining by the United States Constitution preclude the use of the death penalty as a means to attempt to induce guilty pleas because of: (1) the extreme coercive effect with respect to the exercise of constitutional rights to trial; and (2) the freakish, arbitrary and capricious

results in the imposition of the death penalty that result from allowing those who freely admit their guilt to escape the risk of death, while exposing only those who protest their innocence to the risk of execution.

3. Whether the right to counsel under the United States Constitution is violated in a capital case when: (1) the trial court denies the accused the absolute right to fire retained counsel for perceived incompetence three months prior to a trial; (2) the trial court fails to conduct a thorough inquiry when the working relationship and competence of counsel is questioned in the midst of trial; and (3) the reviewing court requires a showing of prejudice as a predicate for recognizing any violation of the right to effective assistance of counsel.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set forth verbatim in an Appendix, infra, at page 7a.

STATEMENT OF THE CASE

The Petitioner was indicted for murder and armed robbery in the Court of General Sessions for Charleston County, South Carolina, on July 9, 1979, for a slaying that occurred on March 24, 1979. Four other persons involved in the incident, including Petitioner's wife, were also indicted, three for murder and one as an accessory to armed robbery.

Petitioner's brother retained one D.J. Stratos of the Charleston Bar to represent both Petitioner and his wife, prior to any indication that the State would seek the death penalty. The three co-defendants were all represented from the outset by appointed counsel These three pleaded guilty, and testified at trial on behalf of the State.

The case was set by the prosecution for disposition by plea as to all five defendants on July 10, 1979. The three represented by appointed counsel entered pleas and were sentenced that day. After the date for guilty pleas was set, however, prior to July 6, 1979, Mr. Stratos advised the prosecutor that Mr. and Mrs. Hyman would

not plead guilty. The prosecutor then, on July 6, 1979, gave notice as required by Statute that the death penalty would be sought. South Carolina Code of Laws, § 16-3-26(A).

On July 9, 1979, Petitioner's case was called for arraignment and plea. Prior to arraignment, at Petitioner's request, Mr. Stratos moved the Court to be relieved as counsel. In open Court, Petitioner personally reiterated this request, made on the basis that Mr. Stratos was "not up to date on the law".

This was the first time Petitioner had ever been before a Court with Mr. Stratos. The Trial Judge denied the Motion on the basis of his interpretation of Rule 5 of the Rules promulgated by the South Carolina Supreme Court pursuant to the State's Defense of Indigents Act, 9A, which he construed to provide that a retained attorney who gave notice of appearance in a criminal case could not be relieved as counsel thereafter. Petitioner, answering a question by the trial judge, stated that he did not have other counsel retained, and further that he did not have funds to retain other counsel. Thereafter, the Court instructed the Clerk of Court to appoint, pursuant to the South Carolina Code, § 16-3-26(B), 11A, an additional attorney to represent Petitioner, and further informed the Court to appoint two other lawyers, as required by Statute, to represent Petitioner's wife, Mr. Stratos having originally represented both of them. Thereafter, Mr. Landon Louthian was appointed as the second attorney for Petitioner.

The trial of the case commenced on October 8, 1979. The record reflects that this is not a typical death penalty case. The only aggravating circumstance found by the jury was armed robbery. Only the completed crime, and not the attempt, is an aggravating circumstance that authorizes the death penalty under the South Carolina Statutes. South Carolina Code of Laws, 1976, as amended, Section 16-3-20(c)(a)(1), 9A. The testimony at trial tended to show that the five defendants had been on a drinking spree and planned to rob the deceased and his brother in order to continue drinking. However, the deceased shot one of the co-defendants, wounding him very severely, and a melee ensued. The testimony of the State's witnesses was quite conflicting about what then occurred, but when all was over, the deceased had been shot dead, the defendants had abandoned their plan to steal cash, and the defendants fled with the gun that the deceased had used to fire several shots at them. They abandoned the gun shortly thereafter. It was for the alleged theft of this gun that Petitioner was convicted of armed robbery; without that conviction, the death penalty could not have been imposed.[1]

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[1] Although it was not effectively argued at trial, there was some question whether the defendants intended to steal the gun, or just took it on the spur of the moment to protect themselves from further gunfire.

Trial counsel in this case made no written pre-trial Motions; the only Motions prior to trial were oral Motions to be relieved as counsel, which were not supported by any argument. Trial counsel did not obtain an independent psychiatric examination of the accused. Trial counsel did not obtain criminal records of the States' witnesses, or move for their production. Trial counsel asked very few questions during the voir dire of the jury panel. Trial counsel made no written requests for jury instructions, on either the issue of guilt or the issue of punishment.

During the trial, Petitioner again moved for a mistrial on the grounds that his lack of confidence in his counsel would prevent him from testifying in his own behalf, (he did not testify until the penalty phase), and, in the post trial motion, Petitioner moved for a new trial, assigning as error the inadequacy of assistance of counsel.[2] At all times during the trial Mr. Stratos served as principal trial counsel.

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[2] In closing argument, on the guilt phase of the trial, Mr. Stratos recited to the jury a poem of his own authorship:

> Better to have loved and lost,
> Than to have to hug a horse.
> It's better to run and been hit,
> Rather to have lied in a pile.

The working relationship between Petitioner and his attorneys was repeatedly called into question: (1) three months before trial when counsel moved to be relieved; (2) at the beginning of trial when counsel advised the Court that the Petitioner would not accept their advice to enter the plea agreement proposed by the State; and (3) in the midst of trial, when Petitioner refused to take the stand, against his counsel's advice, after requesting a mistrial because he did not feel he could testify because of the poor representation of his counsel.

In the penalty phase of the trial proceedings, the prosecutor specifically took the position that the death penalty should not be imposed unless the jury found that the Petitioner had been the person who pulled the trigger, firing the fatal shot, since other participants who had not fired the shot had received life sentences. The jury, obviously unable to agree whether the Petitioner pulled the trigger, returned with questions after several hours of deliberation.

The Trial Judge then instructed the jury, contrary to the position taken by the prosecutor, that the death penalty could be imposed even if they did not find that the Petitioner fired the fatal shot. After further deliberation, the jury returned a sentence of death. The jury was never instructed that the accused should be sentenced to death only if it found that he had personally and specifically intended to cause the death of the deceased by his actions.

The opinion below did not specifically discuss all issues presented on appeal by Petitioner, including some of those issues as presented in this Petition. The Supreme Court of South Carolina did note, however, that "we have carefully reviewed the entire record for prejudicial error overlooked by counsel and find none." 5a. This review was in accordance with its long-standing policy of reviewing the record in capital cases for any error that may appear, whether properly preserved at trial, or even argued by appellate counsel. State v. Allen, 266 S.C. 175, 222 S.E.2d 287, 292 (1976); State v. Boone, 228 S.C. 438, 90 S.E.2d 640, 644 (1955); State v. Taylor, 213 S.C. 330, 49 S.E.2d 289 (1948). Thus, no State Law grounds preclude this Court from addressing any issue in this case, even if that issue was not preserved due to the incompetence of trial counsel, nor specifically argued due to the inadvertence of appellate counsel.

With regard to the questions presented on the appeal, the Court below held as follows:

1. Failing to Instruct the Jury, in the Penalty Phase, to Return a Death Sentence only if the Petitioner Fired the Fatal Shot, or Specifically Intended to Take the Victim's Life.

These issues, presented on pages 196-197 and 202-203 of Petitioner's Brief in the South Carolina Supreme Court, were held to be satisfied by the following charges of the Trial Judge, at 4a:

> In arriving at your recommendation, you on the jury may consider any mitigating circumstances otherwise authorized

or allowed by law. (Tr. p.514...)

> It would be proper for you to consider on matters of mitigation or aggravation obviously whether this defendant used the weapon or whether he didn't. (Tr. p.530...)

2. Invoking the Death Penalty to Coerce a Waiver of Trial.

This issue was presented in pages 199-202 of the Petitioner's Brief, but it was not mentioned specifically by the Court below, which also omitted discussion of a number of other issues.

3. Right to Counsel. The Court did not even discuss the application and implications of the Sixth Amendment for Petitioner's right to discharge, three months before trial, counsel who had been retained by his family, for articulated incompetence. The Court below stated, succinctly, at 1a:

> This motion was addressed to the discretion of the trial judge and will not be disturbed absent an abuse of discretion.[citation omitted] Moreover, the burden was on appellant to show satisfactory cause for removal. [citation omitted]
>
> We conclude the evidence was insufficient to justify relieving counsel and the trial court acted properly in denying appellant's motion.

With regard to the substantive effectiveness of Petitioner's trial counsel, the Court concluded that Petitioner had not demonstrated any prejudice from the alleged delicts of his trial counsel, at 3a.

> Appellant's claims are insufficient to show that justice was not done. He has not shown how counsel's alleged deficiences affected the outcome of the trial.

REASONS FOR GRANTING THE WRIT

The judgment below also required a showing of prejudice as part of a violation of the right to counsel, in conflict with the decision of this Court in Holloway v. Arkansas, 435 U.S. 475 (1978) and prior cases. The State Court has decided a number of questions never precisely addressed by this Court, but which are of great importance in the administration of capital sentencing statutes, and which have been decided in a way probably not in accord with the applicable decisions of this Court.

I: The state court ruling below is not in accord with the principles of this Court that require a finding of deliberate killing, made in accordance with adherence to consistent prosecutorial judgment, before allowing a sentence of death to be imposed.

Presented below, and decided adversely to Petitioner, is a question reserved by this Court in Lockett v. Ohio, 438 U.S. 586, 609 n.16 (1978): whether the Eighth and Fourteenth Amendments permit a sentence of death to be imposed without a finding that the accused "engaged in conduct with the conscious purpose of causing death."[1] Ibid. at 628 (White, J., concurring). In this case, even the prosecutor advised the jurors not to sentence Petitioner to death unless they found that he had personally fired the fatal shot,[2] but the trial court charged the jury that they were not so limited in imposing the death sentence. Petitioner submits that the state court has decided the question reserved in Lockett in a way probably not in accord with the applicable decisions of this Court, particularly on the facts of this case.

As noted in the Statement of the Case, supra, pages 6-7, the record tends to show only that five persons

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[1] This Court has recently granted certiorari to address this question in Enmund v. Florida, 81-5321, 50 U.S.L.W. 3300 (October 19, 1981). Since this case presents related matters involving the significance of prosecutorial judgment as it relates to the question of punishment, the Court may find it appropriate, if this Petition be granted, to expedite hearing on this matter and set it for disposition with Enmund, or, in the alternative, to defer decision on this Petition until after the decision in Enmund.

[2] Record below, page 494.

on a drinking spree planned a robbery to get more money to continue their drinking. When they were met with devastatingly effective armed resistance, a melee ensued in which one of the the intended victims was shot and killed. No one knows for certain who fired the fatal shot, and the jury was not instructed by the trial judge to resolve the conflicting evidence. There is no evidence that any of the drunken persons who planned the robbery intended to kill the victims, and it is doubtful that even the person who fired the fatal shot was capable of enough sober reflection to form a "conscious purpose" to cause the victim's death.

The relevance of this issue to the jury's imposition of the death penalty on Petitioner was made dramatically clear on the record. After several inconclusive hours of deliberation on the penalty, the jurors returned to ask a single question: "Do we have to prove he did the actual killing?"[3] The trial judge replied in pertinent part, as follows:[4]

> "...a person who aids and assists another in the commission of the offense or who was present at the

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[3] Record below, page 528.

[4] Record below, page 529. In fact, since several shots were fired, the jury, on these instructions, could have deprived the Petitioner of mitigation simply by finding that he fired a weapon, without wounding or killing anyone with it.

> time and [sic] committed the offense, would be equally guilty because under the hand of one, the hand of all [,] theory,...anyone who assists the person committing an offense is guilty...It would be proper for you to consider in matters of mitigation or aggravation obviously whether this Defendant used the weapon or whether he didn't..."

Even then the jury required another hour of deliberation before agreeing unanimously on the sentence of death. There are two reasons, on this record, that the death penalty is not consistent with the applicable decisions of this Court.

First, as Mr. Justice White's concurring opinion in Lockett v. Ohio, supra, persuasively demonstrates, the logic of this Court's prior decisions strongly suggests that the Eighth and Fourteenth Amendments preclude the imposition of the unique and extreme penalty of death upon one who has not taken life or intended the death of the victim. According to statistics discussed by Mr. Justice White, fewer than two percent of the persons executed for homicide in the United States since 1954 clearly "did not personally commit the murder." 438 U.S. at 624 and 625 n.7. This statistical analysis is a powerful statement that this nation, as a whole, no longer recognizes the death penalty as an appropriate sentence for one who has neither personally taken, nor intended to take, the life of another. The jury on this case was clearly instructed that it was free to return the death penalty even if Petitioner was only "assisting" in a crime, the equivalent of the felony-murder rule specifically under review in Enmund.

Second, only if the prosecutor's judgment is consistently and scrupulously applied can there be a non-arbitrary system for imposition of the death penalty. When a prosecutor fails to apply his judgment consistently, an impermissible arbitrary factor is thereby introduced into the process of imposing the death sentence because there then can be "'no meaningful basis for distinguishing the few cases in which [the death penalty] [sic] is imposed from the many cases in which it is not.' [Furman v. Georgia], 408 U.S. at 313, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (White, J., concurring)." Gregg v. Georgia, supra, 428 U.S. at 198. Likewise, when a prosecutor determines that the death penalty is appropriate only if certain circumstances are proved by the evidence, to the satisfaction of the jury, an arbitrary factor is introduced into the decision when the prosecutor's determination is explicitly contradicted by the trial judge's instructions to the jury so that the jury is free to ignore the determination made by the prosecutor in exercising his discretion.

II. The state court ruling below is not in accord with the constitutional limits prohibiting use of the death penalty to persuade a defendant to plead guilty, as established in United States v. Jackson and implicated in later decisions of this Court.

One question presented below, and decided adversely to Petitioner, was whether a state prosecutor has discretion to utilize the prospect of the death sentence "to persuade the defendant to forego his right to plead not guilty," Bordenkircher v. Hayes, 434 U.S. 357, 364, reh. den., 435 U.S. 918 (1978); or whether such conduct violates the Eighth and Fourteenth Amendments (1) by deterring the assertion of procedural rights, United States v. Jackson, 390 U.S. 570 (1968); and (2) by inserting a factor in the death-sentencing process that makes the imposition of the death penalty unreliable, inherently arbitrary and capricious, Lockett v. Ohio, 438 U.S. 586 (1978); Furman v. Georgia, 408 U.S. 283 (1972). This precise question has never been addressed by this Court, but the state court has decided it, petitioner submits, in a way probably not in accord with the applicable decisions of this Court.

In Bordenkircher, this Court ruled that the prosecutor's discretionary authority to escalate charges "to persuade the defendant" to plead guilty was not per se unconstitutional, but the Court expressly noted that "broad though that discretion may be, there are undoubtedly constitutional limits on its exercise" since the breadth of that discretion "carries with it the potential for both

individual and institutional abuse." 434 U.S. at 365. As Mr. Justice Brennan has noted, "The penalty schemes involved...are...distinguishable from most plea bargaining because they involve the imposition of death--the most severe and awesome penalty known to our law." Parker v. North Carolina, 397 U.S. 790, 809 (1970) (dissenting opinion). For two reasons the death sentence should not be classified with other enhanced punishments as a permissible threat for plea bargaining.

First, in United States v. Jackson, supra, this Court held that a death-sentencing statute was unconstitutional where the accused could receive the death penalty only if he exercised his right to a trial by jury. As this Court said, 390 U.S. at 581:

> The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.

In Lockett v. Ohio, 438 U.S. 586, 617-19 (1978) (concurring opinion), Mr. Justice Blackmun found capital sentencing likewise flawed, and that the death sentence should have been set aside, where the sentencing judge had the power to dismiss specifications of aggravating circumstances and to impose a life sentence "in the interest of justice" on a guilty plea, but had no such power after a jury trial. This Court also abrogated a death sentence imposed under a Jackson-type statute in Pope v. United States, 392 U.S. 651 (1968). There is no rational distinction between the choice

offered by statute in Jackson and Pope, and the choice offered by the prosecutor is this case.

Second, allowing the death penalty to be used in the plea-bargaining process increases the likelihood of the freakish application of the death penalty, since only those accused who most sincerely assert their innocence are likely to decline the opportunity to plead guilty to avoid the risk of execution. We have created a strange system, indeed, if prosecutors assure leniency for those who are convinced of their own guilt, yet put the risk of execution to those most sincerely convinced of their own innocence.

In the present case, the prosecutor explicitly advised the Court that the death penalty would not be sought if the petitioner pleaded guilty.[1] In fact, although the crime was committed on March 24, 1979, there was never any suggestion that the death penalty would be

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[1] Record below, pages 4-5.

sought until July 6, 1979, when the petitioner indicated he would not join three of his co-defendants in pleading guilty on July 9, 1979.[3]

Ever since this Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), this Court has wrestled with the problem of enhancing reliability in the determination of whether to impose the death penalty. As the Chief Justice wrote in Lockett v. Ohio, supra, 438 U.S. at 605, "When the choice is between life and death, that risk [that the death penalty will be imposed in spite of factors which may call for a less severe penalty] is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." A prosecutor who uses the prospect of the death penalty as a "bargaining chip" in plea bargaining is undermining the system of safeguards this Court is trying to construct to enhance the reliability of capital sentencing, for this is assuring a reprieve for the most clearly guilty, and raising the shadow of the gallows for the accused who is convinced of his innocence.

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[3] See record, below, pages 618, 625, 627, 630-55.

III. The state court ruling below is not in accord with the principles of this Court's decisions to require "every safeguard", including scrupulous enforcement of the right to effective assistance of counsel, in a capital case.

On three separate occasions before the trial court, Petitioner raised the question of the effectiveness of his counsel: (1) the first time he ever appeared in court with counsel, three months before trial, Petitioner sought to have him relieved; (2) in the midst of trial, Petitioner moved for a mistrial on the grounds that his lack of confidence in his counsel would prevent him from testifying in his own behalf (he did not testify until the penalty phase); and (3) in a pro se motion for a new trial, he assigned as error the inadequacy of assistance of counsel. This case thus presents for review several critical questions regarding the protection of the Sixth Amendment guarantee of the right to the assistance of counsel in a capital case:

1. Does the court have any discretion to force on an unwilling defendant counsel who has been retained on behalf of the defendant but has been rejected by the defendant well in advance of trial?

The court below held that the trial court has such discretion, which is essentially unlimited.

2. In a capital case, what inquiry is incumbent upon the trial court when the competence of counsel is called in question by the defendant?

The Court below held that, prior to trial, the court need only inquire as to the extent of counsel's professional experience, and during trial, the court need only inquire additionally as to the extent of the factual investigation undertaken by counsel. The Court further held that the Defendant must demonstrate prejudice from his counsel's conduct.

This Court has never ruled on the precise questions presented here, but we submit that the state court has decided these questions contrary to the principles plainly stated in the applicable decisions of this Court.

A. The Constitution grants no discretion to require an accused to be represented by counsel he deems unsatisfactory if he requests substitution a reasonable time prior to trial.

This Court decided, in Faretta v. California, 422 U.S. 806, 815 (1975), that "the Constitution forbids a State from forcing a lawyer upon a defendant" when he desires to conduct his own defense. "To thrust counsel upon the accused, against his considered wish,...violates the logic of the [Sixth] Amendment." 422 U.S. at 820. "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction." 422 U.S. at 821.

Petitioner submits that the logic of Faretta, when applied to the circumstances of a capital case, compels the conclusion that there should be no discretion to require an accused to continue with unsatisfactory counsel when he requests substitution well in advance of trial. It simply must be intolerable, in a capital case, where the punishment "is unique in its severity and irrevocability" and this

Court "has been particularly sensitive to insure that every safeguard is observed," Gregg v. Georgia, 428 U.S. 153, 187 (1976), to force rejected counsel on the accused despite a timely request for relief. As the Court held in Faretta, "To force a lawyer on a defendant can only lead him to believe that the law contrives against him," 422 U.S. at 834, and this is no less true of the accused seeking substitution of counsel in a capital case than of the accused seeking to represent himself. Cf. United States v. Williams, 594 F.2d 1258, 1260 (9th Cir. 1979). If "every safeguard" is to be observed, plainly the accused is entitled to substitution of counsel upon his timely request, three months before trial, that would not have delayed the proceedings.

B. When the accused calls in question the competence of counsel, and his working relationship to counsel, in a capital case, the trial court has an affirmative obligation to inquire whether counsel is able and prepared to assist the accused effectively at trial.

The question of counsel in a capital case cannot be addressed in a "casual fashion." Powell v. Alabama, 287 U.S. 45, 56 (1932). The court "is not limited to the role of a referee or supervisor," United States v. Nobles, 422 U.S. 225, 230 (1975); cf. United States v. Bosch, 584 F.2d 1113, 1124 (1st Cir. 1978), but has an affirmative obligation to assure that the rights of the accused are protected.

The working relationship between Petitioner and his attorneys was repeatedly called into question, but at no time did the trial Court inquire about the conflict

between Petitioner and his counsel. As this Court has held in Cuyler v. Sullivan, 446 U.S. 335 (1980), and in Wood v. Georgia, ___U.S.___, 49 U.S.L.W. 4218, (March 4, 1981), if no issue of effective assistance is raised at trial, the trial judge may assume that all is well; but if the issue is raised, a thorough hearing is required to assure that effective assistance can be provided by counsel (there regarding multiple representation). See Brown v. Craven, 424 F.2d 1166, 1170 (9th Cir. 1970); United States v. Williams, supra, 594 F.2d at 1260; United States v. Thomas, 450 F.2d 1355 (D.C. Cir. 1971).

Similarly, where the competence of counsel is called into question by the accused in a capital case, Petitioner submits that the trial court has an affirmative duty to inquire, on the record, as to counsel's performance with regard to each of the fundamental obligations of counsel in a criminal case. Illustrative examples have been set forth by the Courts of Appeals in several cases, for example, United States v. DeCoster, 487 F.2d 1197, 1203-4 (D.C. Cir. 1973); Coles v. Payton, 389 F.2d 224, 226 (4th

Cir.), cert. denied, 393 U.S. 849 (1968).[2] The trial court made no inquiry of Petitioner's counsel about most of the types of preparation usually required for competent representation in any criminal case, but particularly in a capital case.

Thus, this case squarely presents the opportunity for this Court to clarify the application of its prior decisions in defining the obligations of a trial judge to insure that the accused in a capital case is receiving effective assistance of counsel.

C. An accused in a capital case need not demonstrate prejudice from the ineffectiveness of his attorneys to gain a new trial.

The failure of the trial court in this case to make the necessary inquiries for the protection of the Petitioner's rights to effective assistance of counsel was disregarded by the court below because Petitioner "has not shown how counsel's alleged deficiencies affected the outcome of the trial." 3a. This holding, however, is clearly inconsistent with the principles stated by this

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[2] Such lists include, for example, the following:

(1) Prompt and frequent consultation with the client.
(2) Arranging independent psychiatric examination.
(3) Interviewing witnesses identified by the accused.
(4) Interviewing the State's witnesses.
(5) Other factual investigation (e.g., criminal records of State's witnesses).
(6) Adequate legal research.
(7) Preparation of appropriate written motions and requests for jury instructions.

Only item (3) is indicated in the record of this case, and the record indicated that the other items on this list were not performed by Stratos or his assistant.

Court only recently in Holloway v. Arkansas, 435 U.S. 475, 489 (1978): "the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.' Chapman v. California, [386 U.S.] at 23." If appellate counsel demonstrates, as was done in the Court below, that there are some particular tasks that should be expected of a reasonably competent criminal attorney in a capital case which trial counsel has failed to perform competently, it is not for the reviewing courts "'to indulge in nice calculations as to the amount of prejudice' attributable to" the deficiencies. Cuyler v. Sullivan, supra, 446 U.S. at 335, quoting Glasser v. United States, 315 U.S. 60, 76 (1942).

CONCLUSION

The decision of the State Court below has decided many important questions in capital cases in a way probably not in accord with the decisions of this Court. The death sentence was affirmed even though the jury was instructed that one assisting in a robbery could be sentenced to death; Lockett v. Ohio, supra, (White, J., concurring). The death sentence was affirmed even though the prosecutor was using the sentence to coerce a plea; United States v. Jackson, supra; Pope v. United States, supra. The death sentence was affirmed even though arbitrary factors were present, including the coercive use of the death penalty combined with instructions to the jury that it was free to ignore the prosecutor's determination that all co-defendants guilty only of felony murder should receive only life imprisonment; Gregg v. Georgia, supra; Furman v. Georgia, supra.

Furthermore, the conviction and sentence were affirmed even though counsel was "thrust...upon the accused, against his considered wish," Faretta v. California, supra. Even though substantial conflict between Petitioner and his counsel was repeatedly identified, the trial judge made no inquiry as to the ability of counsel to provide effective representation under the circumstances; Wood v. Georgia, supra. And finally, the Court below required a demonstration of prejudice by Petitioner, rather than merely a demonstration of incompetent conduct by his counsel; Holloway v. Arkansas.

For the foregoing reasons, the Petition for a Writ of Certiorari to the Supreme Court of the State of South Carolina should be granted. If this Court does not grant plenary review in this matter, this Petition should at least be held in abeyance to determine whether the judgment below should be reversed and this matter remanded for resentencing if this Court reverses the judgment in the case of Enmund v. Florida, No. 81-5321, cert. granted, 50 U.S.L.W. 3300 (October 19, 1981).

Respectfully submitted,

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COUNSEL FOR PETITIONER.

Appendix

The State, ... Respondent,

v.

William Gibbs Hyman, ... Appellant.

Appeal From Charleston County
Clyde A. Fitzroth and Clarence A. Singletary, Judges

Opinion No. 21524
Filed July 22, 1981

AFFIRMED

Chief Attorney John L. Sweeny, of S. C. Commission of Appellate Defense, of Columbia; Cosmo B. Gibbs, Jr., of Gibbs, Gaillard, Rozell & Tanenbaum; and Ann M. Stirling, of McClain & Derfner, both of Charleston, for appellant.

Attorney General Daniel R. McLeod and Assistant Attorney General Kay G. Crowe, both of Columbia; and Solicitor Capers G. Barr, III, of Charleston, for respondent.

Amicus Curiae: Henry F. Floyd, of Pickens; I. S. Leevy Johnson and Jean H. Toal, both of Columbia; David W. Keller, of Florence; and Theo W. Mitchell, of Greenville, for Legislators.

NESS, A. J.: Appellant William Gibbs Hyman was convicted of murder and armed robbery sentenced to death. We affirm.

On March 24, 1979, Teagus Griffis was shot and killed during the armed robbery of hi near Ravenel, South Carolina. Appellant and four accomplices were arrested and indicted the crimes. Three of the accomplices pled guilty to non-capital offenses.

Appellant has raised numerous exceptions to his conviction and death sentence of which are without merit.

(1) Appellant asserts the trial judge erred in denying his motion to have defense sel relieved because he was not up to date on the law. We disagree.

This motion was addressed to the discretion of the trial judge and will not be turbed absent an abuse of discretion. State v. Marshall, 273 S. C. 552, 257 S. E. 2d (1979). Moreover, the burden was on appellant to show satisfactory cause for removal. te v. Marshall, supra.

We conclude the evidence was insufficient to justify relieving counsel and the tria rt acted properly in denying appellant's motion.

(2) Appellant asserts the trial court erred in excluding prospective jurors becaus their views on capital punishment. He argues he was denied a jury representative of his munity because persons unalterably opposed to capital punishment were excluded. He furthe ues that S. C. Code §16-3-20(E) prohibits the exclusion of prospective jurors on the basis their opposition to capital punishment. We disagree.

This contention was resolved in State v. Goolsby, _S. C. ___, 268 S. E. 2d 31 80), where we held when a potential juror was prevented from rendering an impartial decisi vote for the death penalty under any circumstances he could properly be excluded under 6-3-20(E) because of the inability of that juror to faithfully carry out his duty under the d. See State v. Tyner, 273 S. C. 646, 258 S. E. 2d 559 (1979)..

(3) Appellant asserts the trial court erred by not inquiring of the prospective rors if they were unalterably opposed to granting a life sentence in a murder case. We sagree.

A review of the voir dire examination in this case reveals that the prospective were asked if they could give both the State and the appellant a fair and impartial The voir dire conducted ensured the appellant was so tried. See Adams v. Texas, ___, 100 S. Ct. 2521 (1980).

(4) Appellant argues the trial court erred in not refusing to excuse women with children and in selecting a jury composed solely of registered voters. This is without

Although a woman may be excused from jury duty if she has a child under the age n and presents facts warranting excusal, this is not mandatory. See S. C. Code 90 (1976). Moreover, it is within the discretion of the trial judge to excuse a nder this code section and there has been no abuse of discretion shown here. State rs, 263 S. C. 373, 210 S. E. 2d 604 (1974).

Appellant's contention that the use of voter registration rolls in selecting y pool violated his rights under the Sixth Amendment to have a jury representative of munity is without merit. This contention has been generally rejected on the basis ter registration lists are the most representative source of a community. See 80 ALR Moorer v. State, 244 S. C. 102, 135 S. E. 2d 713 (1964); Swain v. Alabama, 380 U. S. S. Ct. 824, 13 L. Ed. 2d 759 (1965).

(5) Appellant asserts the trial court erred in holding a witness' 1960 murder tion was too remote to be used for impeachment. We disagree.

The determination of when a prior conviction becomes too remote to be used for ment rests in the sound discretion of the trial judge and will not be disturbed absent se of discretion. State v. Johnson, 271 S. C. 485, 486, 248 S. E. 2d 313 (1978).

Here, the witness was convicted of murder in 1960. He was paroled in 1970, when le under the then existing laws. During the nine years since he was released from he has committed no crimes of moral turpitude. There has been no showing that the judge abused his discretion in not permitting the witness to be impeached by this conviction.

(6) Appellant contends the trial court erred in reprimanding defense counsel, le the presence of the jury, when he attempted to impeach a witness who allegedly fied in return for being pardoned.

Counsel was reprimanded for continued cross examination about a prior conviction, the trial judge had ruled was too remote. He was not inquiring about a pardon which edly had been granted by the solicitor to the witness for testifying. Moreover, the ing or denial of pardons rests solely with the Probation, Parole & Pardon Board of Carolina. S. C. Code §24-21-910 (1976).

Appellant further argues the reprimand prejudiced him because it chilled defense el's efforts in questioning witnesses, thereby denying him the effective assistance unsel. We disagree.

Here, after being reprimanded outside the presence of the jury, defense counsel d examining the witness and sat down. Appellant contends the reprimand inhibited counse revented him from conducting an adequate defense. He further contends under State v. ons, 267 S. C. 479, 229 S. E. 2d 597 (1976) there is a presumption of prejudice when el has been chilled in his efforts to zealously represent his client. However, in v. Wright, 271 S. C. 534, 248 S. E. 2d 490 (1978), in addressing a similar problem, eld that although prejudice is sometime presumed, we will not grant a new trial where e is no prejudice. The rebuke took place outside the presence of the jury and the actior ne trial judge were proper. There is no evidence in the record that the witness testifie xchange for a pardon, and appellant was not prejudiced when counsel ceased examining the ess.

(7) Appellant contends the trial court erred in submitting the charge of armed ery to the jury. We disagree.

Appellant argues (1) the evidence failed to show a deadly weapon was used to accom h the robbery; and (2) there was no evidence of an intent to steal.

(1979). In reviewing the denial of a motion for a directed verdict in a criminal case the evidence must be viewed in the light most favorable to the State. State v. Hill, S. 340, 234 S. E. 2d 219 (1977).

There is evidence in the record that appellant entered Griffis' home carrying gun and beat Collis Griffis with this shotgun. Subsequently, Collis Griffis' shotgun en by the appellant. In State v. Williams, 237 S. C. 252, 116 S. E. 2d 858 (1960), rmed a robbery conviction of a defendant who took a police officer's pistol during gle with the officer while he was attempting an arrest. The same rationale applies

Appellant contends a deadly weapon was not used in the commission of the robbery the stock of the shotgun was broken during the melee. In State v. Bailey, 273 S. C. 0, 257 S. E. 2d 231 (1979), we held "a gun used in a robbery is a deadly weapon regard- its alleged inoperability."

Appellant argues that intent to steal must occur simultaneously with the taking property to constitute robbery. In State v. Craig, 116 S. C. 440, 107 S. E. 926 the Court held the intent to steal need not have existed at the time of obtaining sion of the stolen goods. This exception is without merit.

We conclude the trial judge properly charged the law on robbery.

(8) Appellant asserts the trial court erred in charging the jury that there is umption of malice which arises from the use of a deadly weapon, or from the intentional of an unlawful act, without just cause or excuse because this created a mandatory pre- on. In State v. Crocker, 272 S. C. 344, 251 S. E. 2d 764 (1979), we upheld both precept lied malice as not contravening the due process requirements of Mullaney, et al. v. , 421 U. S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).

(9) Appellant argues he was denied the effective assistance of counsel. It is al to address this issue on direct appeal. However, appellant contends his motions to counsel relieved, for a mistrial and for a new trial were all based upon the incompetency unsel, therefore, it is properly before us for review.

Moreover, as this is a capital case we apply the rule, in favorem vitae, and examine ecord for error.

Appellant's claims are insufficient to show that justice was not done. He has hown how counsel's alleged deficiencies affected the outcome of the trial. In United v. Decuster, 624 F. 2d 196, 214 (D. C. Cir. 1976), the court held, "[i]n the absence governmental impediment to effective assistance of counsel, the court cannot lightly te a conviction on the basis of its own appraisal of the performance of defense counsel." onclude there is no evidence of probative value supporting appellant's contention that as denied the effective assistance of counsel. Greene v. State, Op. No. 21432, Smith's /81.

(10) Appellant asserts the South Carolina Death Penalty Statute, §16-3-20 is nstitutional because it is disproportionately imposed on individuals who kill white ons. The constitutionality of our death penalty statute was upheld in State v. Shaw, S. C. 194, 255 S. E. 2d 799 (1979). "[P]urposeful discrimination may not be assumed or ly asserted...It must be proven ..., and the burden is on the one asserting discriminati in v. State of Alabama, 380 U. S. 202, 205, 209, 85 S. Ct. 824, 827, 13 L. Ed. 2d 759 5);..." Maxwell v. Stephens, 348 F. 2d 325 (8th Cir. 1965). Appellant has made no showi disproportionality. Williams, et al. v. Borden's Inc., 274 S. C. 275, 262 S. E. 2d 881 80); Apodaca v. Oregon, 406 U. S. 404, 413, 92 S. Ct. 1628, 32 L. Ed. 2d 184 (1972); en v. Missouri, 439 U. S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979); State v. Moultrie, S. C. 532, 257 S. E. 2d 730 (1979).

We conclude no error was committed in the guilt stage of appellant's bifurcated al and his conviction for murder and armed robbery is affirmed.

Under §16-3-20, supra, the trial court is bound, upon a conviction for murder, to nduct a separate sentencing proceeding to determine whether the defendant should be senter life imprisonment or death. When the death penalty has been imposed, it is mandatorily

ly as to ensure it was not the result of passion, prejudice or any arbitrary factor. ide §16-3-25 (1976).

(11) Appellant asserts the trial court erred in refusing to declare a mistrial of the solicitor's cross examination of him during the sentencing proceeding. We e.

Appellant's character was in issue during the sentencing phase of the trial, lly in light of his testimony that he had "found" God and was repentant of his past See State v. Shaw, supra. Moreover, in State v. Allen, 266 S. C. 468, 224 S. E. 2d 76), we held:

> "'[A]ny matter is a proper subject of cross examination which is responsive to testimony given on direct examination, or which is material or relevant thereto, and which tends to elucidate, modify, explain, contradict or rebut testimony given in chief by the witness.'" 266 S. C. at 483.
>
> "[T]he State was not required to accept, without cross examination, the defendant's version of what had happened..." 266 S. C. at 484.

Here, the cross examination concerned two acts of alleged misconduct and were nt to the issue of character and credibility.

(12) Appellant argues the solicitor made an improper closing argument and the judge erred in his charge to the jury by using the word "recommend." We resolved this in the recent opinion of State v. Linder, Op. No. 21452, Smith's 5/14/81, p. 18 wherein ld,

> "Use of the word 'recommend' by the trial judge or solicitor is not per se suspect. Under the statute 'recommendation' is the term applied to the jury's function at this phase of the trial. To instruct the jury that it will recommend what sentence the convicted murderer will be given is not improper and does not mask the true nature of the jurors' responsibility at this phase of the trial."

(13) Appellant asserts the trial court erred in its charge to the jury. We disagree.

In reviewing a jury charge for error, we consider the charge as a whole in light he evidence and issues as presented during the trial. State v. Tucker, 273 S. C. 736, S. E. 2d 414 (1979). The law to be charged must be determined from the evidence presente e v. Jones, 273 S. C. 723, 259 S. E. 2d 120 (1979).

Appellant argues the charge was erroneous because the trial judge failed to inuct the jury they could find as a statutory mitigating circumstance (1) he was an accompl a murder committed by another person and his participation was relatively minor; or (2) h provoked by the victim." There is no evidence in the record to support such a charge, refore, the judge did not err by refusing to give the instruction.

Appellant next contends the trial judge failed to charge the jury as to non-statut igating circumstances. The record reflects the judge charged the jury as follows:

> "In arriving at your recommendation, you on the jury may consider any mitigating circumstances otherwise authorized or allowed by law." (Tr. p. 514, f. 17-18).
>
> "It would be proper for you to consider in matters of mitigation or aggravation obviously whether this defendant used the weapon or whether he didn't...." (Tr. p. 530, f. 3-5).

The United States Supreme Court in Lockett v. Ohio, 438 U. S. 586, 98 S. Ct. 2954 7 L. Ed. 2d 973 (1978) held:

"...[T]hat the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 98 S. Ct. at 2964-2965.

the charge complied with the mandate of the Court in Lockett v. Ohio, supra, and the n South Carolina.

Appellant contends the trial judge failed to instruct the jury they could return e sentence even if they were to find statutory aggravating circumstances beyond a nable doubt. We disagree.

The trial judge charged, "if you conclude that the recommendation should be life lonment, you may return that without finding any mitigating circumstances and even if ggravating circumstance is present." (Tr. p. 529, l. 14-17). The charge as a whole rly instructed the jury that they could return a life sentence even if they found utory aggravating circumstances.

We conclude in reviewing the charge to the jury in its entirety there was no error.

(14) Appellant asserts the death penalty imposed in this case is disproportionate he severity of the offense. We are required under §16-3-25 to determine "whether the ence of death is excessive or disproportionate to the penalty imposed in similar cases[1] sidering both the crime and defendant." The record clearly reflects appellant planned, ared and committed a brutal crime for the purpose of obtaining money. The death penalty roportionate to a crime of this nature and to the crime and defendant in this case.

The transcript of record in this case exceeds 650 pages. We have carefully reviewed entire record for prejudicial error overlooked by counsel and find none. We affirm the viction and sentence of death of appellant William Gibbs Hyman.

Affirmed.

LEWIS, C.J., LITTLEJOHN, GREGORY and HARWELL, JJ., concur.

---

[1]State v. Shaw and Roach, 273 S. C. 194, 255 S. E. 2d 799 (1979).

The Supreme Court of South Carolina

FRANCES H SMITH
CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211

August 19, 1981

Coming B. Gibbs, Esquire
P. O. Box 659
Charleston, South Carolina 29402

Ms. Ann M. Stirling
P. O. Box 102
Charleston, South Carolina 29402

Re: The State v. William Gibbs Hyman

Dear Mr. Gibbs and Ms. Stirling:

The Court has this day refused your Petition for Rehearing and Application for Stay of Execution in the above case in the following order:

"Petitions Denied.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ J. B. Ness A.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J.

August 19, 1981"

The remittitur is being sent down today.

Very truly yours,

Frances H. Smith
CLERK

FHS/rl

cc: Ms. Kay G. Crowe
The Honorable Brian P. Gibbes
The Honorable Lindy P. Funkhouser

APPENDIX: CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

United States Constitution, Amendment Five:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation;

United States Constitution, Amendment Six:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment Eight:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment Fourteen:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States,

Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5: The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

South Carolina Code of Laws, Section 16-3-20:

Punishment for murder; separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A): A person who is convicted of or pleads guilty to murder shall be punished by death or by imprisonment for life and shall not be eligible for parole until the service of twenty years, notwithstanding any other provisions of law. Provided, however, that notwithstanding the provisions of this section, under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition.

(B) Upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If the trial jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the court. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment. Only such evidence in aggravation as the State has made known to the defendant in writing prior to the trial shall be admissible. This section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant and his counsel shall be permitted to present arguments for or against the sentence of death. The defendant and his counsel shall have the closing argument regarding the sentence imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances otherwise authorized or allowed by law and any of the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Aggravating circumstances:

(1) Murder was committed while in the commission of the following crimes or acts: (a) rape, (b) assault with intent to ravish, (c) kidnapping, (d) burglary, (e) robbery while armed with a deadly weapon, (f) larceny with use of a deadly weapon, (g) housebreaking; and (h) killing by poison and (i) physical torture;

(2) Murder was committed by a person with a prior record of conviction for murder;

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties;

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor;

(5) The defendant acted under duress or under the domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

(7) The age or mentality of the defendant at the time of the crime;

(8) The defendant was provoked by the victim into committing the murder;

(9) The defendant was below the age of eighteen at the time of the crime.

The statutory instructions as to aggravating and mitigating circumstances shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, and signed by all members of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Unless at least one of the statutory aggravating circumstances enumerated in this section is so found, the death penalty shall not be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. The trial judge, prior to imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to life imprisonment. In the event that all members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous.

(D) Notwithstanding the provisions of § 14-7-1020, in cases involving capital punishment any person called as a juror shall be examined by the attorney for the defense.

(E) In every criminal action in which a defendant is charged with a crime which may be punishable by

death, a person may not be disqualified, excused or excluded from service as a juror therein by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict of guilty according to law.

South Carolina Code, Section 16-3-26, (A) and (B):

Punishment for murder: notice to defense attorney of solicitor's intention to seek death penalty; appointment of attorneys for indigent; investigative, expert or other services.

(A) Whenever the Solicitor seeks the death penalty, he shall notify defense attorney of his intention to seek such penalty at least 30 days prior to the trial of the case. At the request of the defense attorney, the defense attorney shall be excused from all other trial duties ten days prior to the term of court in which the trial is to be held.

(B) Whenever any person is charged with murder and the death penalty is sought, the court, upon determining that such person is unable financially to retain adequate legal counsel, shall appoint two attorneys to defend such person in the trial of the action. One of the attorneys so appointed shall have at least five years' experience as a licensed attorney and at least three years' experience in the actual trial of felony cases, and only one of the attorneys so appointed shall be the Public Defender or a member of his staff.

The State shall pay from funds appropriated for the defense of indigents such fee and costs, not to exceed fifteen hundred dollars, as the court shall deem appropriate.

Rules of the South Carolina Supreme Court, Rule Five, Defense of Indigents Act:

[Assignment to continue until final judgment]

1. Trial counsel, whether retained, assigned private counsel or Public Defender, shall continue his representation of an accused until final judgment, including any proceeding on direct appeal, unless relieved for good cause upon written petition to and by written order of a judge of the circuit court. In all cases where relief from representation is sought by trial counsel, a copy of the petition shall be served on the accused and the prosecuting attorney. The Public Defender shall be served when relief is sought by retained counsel or assigned private counsel.

2. If trial counsel is relieved by a circuit judge for good cause, the court shall immediately appoint substitute counsel. The fact that an accused is indigent at the conclusion of the trial shall not constitute good cause justifying relief of retained counsel.

RECEIVED
NOV 16 1981

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81 5731

WILLIAM GIBBS HYMAN, Petitioner

v.

UNITED STATES OF AMERICA

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Petitioner, William Gibbs Hyman, who is now held in the South Carolina Penitentiary, under sentence of death, asks leave to file the attached Petition for a Writ of Certiorari to the Supreme Court of South Carolina without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The Petitioner's affidavit in support of this motion is attached hereto.

GIBBS, GAILLARD & POWELL

BY _____
Coming B. Gibbs, Jr.
145 King Street, Suite 409
Post Office Box 659
Charleston, South Carolina 29402

ATTORNEYS FOR WILLIAM GIBBS HYMAN

Charleston, South Carolina.

November 13, 1981.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81 5731

WILLIAM GIBBS HYMAN, Petitioner

v.

UNITED STATES OF AMERICA

AFFIDAVIT

I, William Gibbs Hyman, being first duly sworn according to the law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: 1. I am the Petitioner in the above entitled case. 2. Because of my poverty, I am unable to pay the costs of said cause. 3. I am unable to give security for the same. 4. I believe that I am entitled to the redress I seek in said case. 5. The nature of said cause is briefly stated as follows:

I was sentenced to death by electrocution by the Court of General Sessions for Charleston County, State of South Carolina, on a charge of murder. I appealed my conviction and sentence to the South Carolina Supreme Court. I am seeking review of the decision of the South Carolina Supreme Court by a Petition for Writ of Certiorari, which seeks a decision by this Court that I was denied the right to discharge retained counsel three months prior to trial, my rights were violated by having the same counsel continue to represent my by appointment by the Court, and the South

Carolina Supreme Court incorrectly ruled that I must show prejudice before the question of effective assistance of counsel could be considered by it; that the prosecutor at the trial violated my rights by using the death penalty in an attempt to coerce a guilty plea; and that my constitutional rights were violated by the trial judge's charge to the jury that I could be sent to the electric chair without a finding either of specific intent to kill, or that I personally fired the fatal shot, despite the fact that the prosecutor had told the jury that they should not find the death penalty unless they also found I had fired the fatal shot.

WILLIAM GIBBS HYMAN

SWORN to and subscribed before me, a Notary Public, this 12th day of November, 1981.

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires 9-29-86.

Opposition

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ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-5731

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SUPREME COURT, U.S.

WILLIAM GIBBS HYMAN, Petitioner,

versus

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT A TRUE COPY OF Brief in Opposition HAS BEEN SERVED UPON OPPOSING COUNSEL BY MAILING 1 COPIES IN AN ENVELOPE PROPERLY ADDRESSED WITH POSTAGE PREPAID THIS 10 DAY OF DECEMBER, 1981

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SWORN TO BEFORE ME THIS 10 DAY OF December, 1981

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My Commission Expires 10-10-88

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OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Opinion No. 21524, filed July 22, 1981, as reproduced in Petitioner's Appendix at pages 1A - 5A.

JURISDICTION

Respondent does not question the Court jurisdiction in this proceeding.

QUESTIONS PRESENTED

I.

Did the trial court err in charging, in accordance with South Carolina law, that the death penalty could be imposed on a person guilty of murder as "a person who aids and assists another in the commission of the offense?"

II.

Does Petitioner have standing to claim that the death penalty unconstitutionally persuades a defendant from foregoing his right to plead not guilty since he did, in fact, plead not guilty on arraignment in this case?

III.

Did the trial court abuse its discretion in appointing additional counsel for Petitioner when he expressed dissatisfaction with counsel who had been retained by his brother?

STATEMENT OF CASE

Petitioner was arrested in March, 1979 and charged with the March 14 murder and armed robbery of one Teagus Griffis, in Ravenel, South Carolina. Thereafter, his brother retained D. J. Stratos, Esquire, of the Charleston County Bar, as his attorney. Mr. Stratos was initially retained to represent both the defendant and his wife, who were charged with this particular murder and armed robbery. On July 9, 1979, Petitioner and his wife were indicted by the Grand Jury of Charleston County on the charges of murder and armed robbery. The Petitioner appeared before the Honorable Clyde H. Eltzroth on July 9, 1979, for the purpose of a hearing on a motion by him. Prior to this time the State had in writing given the defendant Notice of its Intention to Seek the Death Penalty. Ths Notice was dated July 6, 1979. At the July 9, 1979, hearing Mr. Stratos informed the court that his clients had informed him that they would like to replace him as an attorney and he moved before the court to be replaced. After a hearing on the motion, during which the Petitioner had

an opportunity to speak to the court, the trial judge denied the motion to relieve Mr. Stratos relying in part on Rule 5 of the Defense of Indigents Act for South Carolina. The defendant was then arraigned and he responded appropriately to the questions asked him during the course of arraignment. After arraignment, in light of the State's intention to seek the death penalty, a second counsel was appointed to represent Mr. Hyman. The second counsel so appointed was Landon Louthian, Esquire, of the Charleston County Bar. The case against Petitioner was called to trial on October 8, 1979 before the Honorable Clarence E. Singletary, Presiding Judge. At the trial of this case, Petitioner was represented by D. J. Stratos, Esquire and Landon Louthian, Esquire. Respondent disputes Petitioner's assertion that "At all times during the trial Mr. Stratos served as principal trial counsel." (Petition, p. 7). Petitioner was convicted of murder and armed robbery and was sentenced by the the trial jury to death.

ARGUMENT

I.

The trial court properly did not instruct the jury to return a death sentence only if the Petitioner fired the fatal shot since such a charge would not comport with South Carolina law. (Petitioner's Argument I).

On this argument Petitioner claims that he was entitled to a specific charge requiring the jury to find that he personally fired the fatal shot before it could return the death penalty. The South Carolina Supreme Court has recently held that

> ...South Carolina adheres to the common law rule of murder and makes no distinction between murder and felony murder. State v. Judge, 208 S.C. 497, 38 S.E. 2d 715 (1946). Therefore, a statutory aggravating circumstance would remain a circumstance of the murder in a death penalty case regardless of whether the crime charged is murder or felony murder. State v. Thompson, Op. No. 21596, ___ S.E. 2d ___, November 23, 1981.

This decision clearly shows that South Carolina follows the common law rule as to aider and abettor liability for criminal acts. See State v. Hill, 268 S.C. 390, 395-396, 234 S.E. 2d 219, 221, cert. den. 434 U.S. 870, 54 L. Ed. 2d 147, 98 S. Ct. 211 (1977).

The facts of this case show that Petitioner was the "trigger man" in the fatal shooting of Mr. Teagus Griffis. The codefendants who were eyewitnesses to the crime placed the gun in the hand of William Gibbs Hyman, placed him in the location where the shot was fired and placed him acknowledging the shooting subsequent to the crime. Petitioner testified in his own behalf in the penalty phase of the trial and acknowledged that he was in Ravenel, South Carolina at the scene of the crime on the night of the crime with the codefendants in the case. He testified, however, that he had no recollection of the events or sequence of events of the crime. This does not constitute affirmative evidence that he was not the triggerman. The charge of the judge fully complied with the mandate of this Court in Lockett v. Ohio, 438 U.S. 586, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978) since the trial judge charged the jury on the law governing aiding and abetting liability but further in his supplemental charge instructed the jury that it could consider in mitigation its finding on whether or not the

Petitioner had the gun and fired the shots. The charge of the lower court on this matter is set out as follows:

> It would be proper for you to consider in matters of mitigation or aggravation obviously whether this defendant used the weapon or whether he didn't.... (Tr. p. 530, lines 3-5).

II.

Petitioner has no standing to attack the death penalty on the grounds that it tends to persuade a defendant to plead guilty inasmuch as he can make no showing that he was forced to plead guilty in the case. (Petitioner's Argument II).

Petitioner cannot claim that he was forced "to forego his right to plead not guilty" since he pleaded not guilty in the case and put the State to its burden of proof in the case Ulster County Court v. Allen, 442 U.S. 140, 60 L. Ed. 2d 777, 99 S. Ct. 2213 (1979).

III.

The lower court properly assured Petitioner, an indigent defendant, of his right to effective assistance of counsel by appointing additional counsel to represent him in his defense. (Petitioner's Argument III).

The trial judge properly denied the motion by Petitioner's trial counsel, D. J. Stratos, Esquire, to be relieved from the case. The court in making its ruling relied upon Rule 5 of the South Carolina Defense of Indigents Act, which provided, in pertinent part, as follows:

> Trial counsel, whether retained, assigned private counsel or public defender, shall continue his representation of accused until final judgment, including any proceeding upon direct appeal, unless relieved for good cause upon written petition to and by written order of a judge of the circuit court. In all cases where relief from representation is sought by trial counsel, a copy of the petition shall be served on the accused and the prosecuting attorney. The public defender shall be served when relief is sought by retained cousnel or assigned private counsel. South Carolina Code of Laws, 1976, Cum. Supp. 1979.

Clearly, the judge in this case properly applied Rule 5 of the Defense of Indigents Act as it existed at the time of the hearing before him to this case.

The Petitioner also asserts that even if Rule 5 is applicable to this case, which clearly it is, that the trial judge erred in failing to find good cause to relieve D. J. Stratos, Esquire. The defendant, along with his counsel D. J. Stratos, Esquire, appeared before Judge Eltzroth on July 9, 1979. At that time attorney Stratos indicated to the court that his client had informed him that he would like to replace him as attorney and he moved before the court to be replaced. The court at that time questioned the defendant in this case. He asked him if he had retained another counsel to which the defendant responded no. He asked him if he had funds to retain another attorney to which he replied no. At that point in time for the purpose of determining this defendant's right to counsel of his own choosing, he became for all practical purposes an indigent. The court then inquired

as to why the defendant desired counsel to be discharged. The response of the defendant was that he did not believe attorney Stratos was up to date on the law. (Tr. p. 619, lines 15-16). The judge then explored what this statement by this defendant meant. The judge in some detail attempted to explore the advice which had been given by counsel and the relationship between this counsel and his client. The judge informed the defendant that he had a right to refuse the attorney's help, and that he would be allowed to represent himself. The trial judge also informed the defendant that he could hire any other counsel if he wished or that his family could hire any other counsel to represent him. The judge also ordered that a second counsel be appointed to represent this defendant since the State was seeking the death penalty and Landon Louthian, Esquire, of the Charleston County Bar was duly appointed. The Record before this Court indicates that the judge acted within his discretion in failing to find good cause pursuant to Rule 5 of the Defense of Indigents Act to relieve attorney Stratos. It is also clear that the actions of the judge did not violate this indigent defendant's right to counsel.

The law is well established that a defendant has a right to be represented by counsel where he is on trial and is faced with incarceration. If the defendant is financially unable to employ counsel, the State must provide counsel for him. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). Conversely, a defendant so charged with a criminal offense, has the right, if he so elects, to conduct his own

defense without counsel. Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975). The most common method for the State to provide counsel to indigent defendants is by way of appointment. South Carolina Defense of Indigents Act provides for a mechanism for the appointment of counsel to an indigent defendant. Rule 5 of the South Carolina Defense of Indigents Act places upon retained counsel whose client is indigent the same restrictions and duties placed upon appointed counsel. This rule serves to encourage and promote the participation of the private bar in the representation of criminal defendants. It also provides for continuity of representation of the defendant who becomes indigent during the course of representation by counsel. Rule 5 is a valid exercise of the State's right to select a mechanism of providing counsel to defendants.

The law is clear that a criminal defendant who is not indigent has the right to retain private counsel of his choice. Atilus v. United States, 406 F. 2d 694 (Fifth Circuit 1969). This right, however, is not without limitations. The court has an obligation to avoid attorneys with conflicts of interest, to prevent attorneys who are incompetent or who have demonstrated misbehavior from representing clients and to prevent defendants from manipulating the criminal docket to delay their cases. In the case of the defendant who is not indigent, this right is based to a large extent upon the fact that he has the present ability to obtain other counsel. Where the defendant is indigent,

he also has the power to discharge appointed counsel. However, he does not have the power to have other counsel appointed for him unless good cause is shown. The good cause requirement appears both in Rule 5 of the South Carolina Defense of Indigents Act and also in the cases dealing with this substitution of appointed counsel.

The South Carolina Supreme Court in State v. Jones, ___ S.C. ___, 243 S.E. 2d 461 (1978), which cited with approval State v. Robinson, 290 N.C. 56, 224 S.E. 2d 174 (1976), held that at least after the trial had begun a mere disagreement between defendant and his counsel as to a matter of trial tactics is not sufficient in itself to require the trial court to replace or to offer to replace court appointed counsel with another attorney at that time. The Court in Jones stated that the general rule was that while accused may have the right to reject of discharge appointed counsel and conduct his own defense or secure his own counsel, he does not have the right, without a showing of staisfactory cause to refuse or dismiss the counsel appointed and have other counsel appointed. 23 C.J.S. Criminal Law §982 (5) (1961). See 157 A.L.R. 12251 cf. 73 A.L.R. 3d 725. Petitioner has not shown how application of this rule violated his right to assistance of counsel.

CONCLUSION

For all of the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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